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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1239**

Antonio Jones,  
Relator,

vs.

ARG Resources, LLC,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed March 11, 2013  
Affirmed  
Toussaint, Judge \***

Department of Employment and Economic Development  
File No. 29493623-3

Antonio D. Jones, Maplewood, Minnesota (pro se relator)

ARG Resources, LLC, Indianapolis, Indiana (respondent employer)

Lee B. Nelson, Colleen Timmer, Department of Employment and Economic  
Development, St. Paul, Minnesota (for respondent Department)

Considered and decided by Johnson, Chief Judge; Stoneburner, Judge; and  
Toussaint, Judge.

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to  
Minn. Const. art. VI, § 10.

## **UNPUBLISHED OPINION**

**TOUSSAINT**, Judge

Relator Antonio Jones challenges the decision by the unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he was discharged for employment misconduct based on his continuing violations of respondent ARG Resources, LLC's (ARG) attendance policy. He argues that (1) ARG fired him in retaliation for his complaints about the workplace and for discriminatory reasons, not attendance issues; and (2) the ULJ conducted the hearing in an unfair manner. Because the evidence in the record substantially supports the ULJ's findings and decision that Jones was terminated because of employment misconduct and relator received a fair hearing, we affirm.

### **D E C I S I O N**

The ULJ ruled that Jones was ineligible for unemployment benefits because ARG discharged him for violations of ARG's attendance policy, which constituted employment misconduct.

When reviewing the decision of a ULJ, this court may modify, remand, or reverse the decision if the substantial rights of the relator were prejudiced because the ULJ's decision was "made on unlawful procedure; affected by other error of law; or unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(3)-(5) (2012). "Whether the employee committed a particular act is an issue of fact. This court views questions of fact in the light most favorable to the decision of the ULJ and gives deference to the ULJ's credibility determinations."

*Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011). “Determining whether a particular act constitutes disqualifying misconduct is a question of law that we review de novo.” *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011).

### *Misconduct*

An applicant who is discharged from employment is ineligible to receive unemployment benefits if “the applicant was discharged because of employment misconduct.” Minn. Stat. § 268.095, subd. 4(1) (2012). Employment misconduct is defined as “any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a) (2012). “Whether an employee’s absenteeism and tardiness amounts to a serious violation of the standards of behavior an employer has a right to expect depends on the circumstances of each case.” *Stagg*, 796 N.W.2d at 316.

ARG required its employees to arrive at work at their scheduled start time and to contact management at least three hours before the start of their scheduled shift if they were unable to report to work. Continued tardy arrivals to work, combined with several warnings from the employer, may constitute employment misconduct. *Evenson v. Omnetic’s*, 344 N.W.2d 881, 883 (Minn. App. 1984). The ULJ found that from May 2011 through mid-March 2012 when he was fired, Jones was late to work by more than five minutes in 158 of the 254 shifts he worked, and that his manager verbally warned

him multiple times that he needed to be at work on time. Jones admitted to these tardy arrivals at the hearing, although he denied receiving the verbal warnings. The ULJ went on to find that in 46 of these 158 late arrivals, he was late by more than 15 minutes. Jones disputed this number, contending that he was this late on only 15 or 16 occasions. Substantial evidence in the record supports the ULJ's findings, including ARG's records and the testimony by its witnesses. And we defer to the ULJ's decision to credit the testimony and evidence provided by ARG over that of Jones "because it was detailed, reasonable and persuasive." *See Cunningham*, 809 N.W.2d at 235.

The ULJ also found that on two occasions Jones violated the requirement that he contact management at least three hours ahead of time if he was going to miss a scheduled shift. DEED seems to concede that one of these two "no-calls/no-shows" may not constitute misconduct based on the circumstances. "[A] single absence from work may constitute misconduct when an employee has not actually received permission to be absent." *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 417 (Minn. App. 1986). In addition, the ULJ found that Jones missed two shifts of work in November 2011 because he was in jail, which he could have prevented by payment of a citation. *See Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006) ("Absence from work under circumstances within the control of the employee, including incarceration following a conviction for a crime, has been determined to be misconduct sufficient to deny benefits."). These findings are supported by substantial evidence in the record.

Jones, however, argues that he was discharged not because of his attendance issues, but in retaliation for complaints he made regarding ARG management or practices

and for discriminatory reasons based on the fact that he was in a same-sex relationship with his coworker. Jones contends that his late arrivals were not an issue with ARG, because his managers allowed him to arrive at work a little late due to the bus schedule. He also noted that he had not been warned about his continuing tardy arrivals, and that his last written warning for tardiness occurred in September 2010, and his last written warning as to attendance occurred in February 2011.

As to bias, Jones complained that he and his partner were required to take their scheduled breaks, rather than working through breaks as others were allowed to do, and thus worked fewer hours. He also complained that although they were qualified, he and his partner were not promoted to be managers, although a man and a woman who were a couple were promoted and allowed to work together as managers. He asserted that he and his partner applied for but were not granted a transfer to a different store. He also testified that his manager was biased and negative toward him. Additional facts that he asserted for the first time in his brief to this court may not be considered.

The ULJ questioned ARG's witnesses closely about these claims. The area manager and the general manager of the store both testified that Jones had been discharged solely for his violations of the attendance policy. Jones's manager testified that she had verbally warned Jones on multiple occasions that he needed to be at work on time. The area supervisor testified that Jones's complaints did not factor into her decision to discharge him. Further, she testified that after Jones complained that his manager was biased against him, the three of them had talked and worked it out. She

explained that Jones's transfer request had not been granted because of his excessive absenteeism.

As discussed above, the ULJ credited the testimony and evidence provided by ARG over that of Jones "because it was detailed, reasonable and persuasive." The ULJ concluded that the preponderance of the evidence showed that ARG discharged Jones for employment misconduct based on his continuing attendance problems, finding the contention that he was discharged for retaliatory and discriminatory reasons "dubious under the circumstances and unpersuasive."

The ULJ acknowledged Jones's testimony that management allowed him to come into work a couple minutes after his 7:00 a.m. start time because the bus dropped him off at 7:01 a.m. In fact, the ULJ and the employer counted Jones's arrivals as tardy only when he was more than five minutes late to work, even though there were many times when he was late by five minutes or less. The ULJ found that while "the employer may have been somewhat lenient with Jones during his tenure, the evidence shows that he was warned verbally and in writing that he needed to improve his attendance and be on time. After receiving multiple warnings, Jones continued to frequently come in late by more than five minutes." The ULJ concluded that Jones's conduct was both a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee and showed a substantial lack of concern for the employment, constituting employment misconduct.

Following our extensive review of the transcript and the record, we conclude that the ULJ's findings that ARG discharged Jones for violating ARG's attendance policy, not

for retaliatory or discriminatory reasons, are supported by substantial evidence in the record and we defer to the ULJ's creditability determinations. The ULJ's conclusion that Jones's conduct constituted employment misconduct, making him ineligible to receive unemployment benefits, is correct as a matter of law.

*Fair hearing*

Jones argues that the ULJ conducted the hearing in an unfair manner. The ULJ must explain fully how the hearing will be conducted and "must ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (2012). "The judge should assist unrepresented parties in the presentation of evidence" and "must exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing." Minn. R. 3310.2921 (2011). "A judge may receive any evidence that possesses probative value," but "may exclude any evidence that is irrelevant, immaterial, unreliable, or unduly repetitious." Minn. R. 3310.2922 (2011). A ULJ's decision will be reversed or modified based on error only "if the substantial rights of the relator may have been prejudiced." Minn. Stat. § 268.105, subd. 7(d).

We have considered Jones's arguments that the ULJ failed to grant his requests to subpoena several witnesses and documents. A ULJ must fully consider subpoena requests and may not unreasonably deny them. Minn. Stat. § 268.105, subd. 4 (2012). But the ULJ may deny subpoena requests "if the testimony or documents sought would be irrelevant, immaterial, or unduly cumulative or repetitious." Minn. R. 3310.2914, subp. 1 (2011). After an extensive review of the transcript and record, we conclude that the ULJ fully and fairly addressed Jones's subpoena requests at the hearing and denied

his requests for subpoenas that were unnecessary or insufficiently material. There is no showing that the ULJ's subpoena decisions were erroneous.

Next, Jones complains that he sought but did not receive copies of the complaints that he submitted to ARG, but the record shows that he received a copy of one complaint, which was apparently the only complaint that ARG could find that he submitted while employed. He also contends that he did not receive a copy of one of ARG's exhibits until after the evidentiary hearing. As the ULJ summarized in his order on reconsideration, the ULJ reviewed the exhibits with both parties to ensure that they had all of the exhibits; Jones said that he did not object to exhibits one through twelve being entered into the record, and did not inform the ULJ that he did not have a copy of any of the exhibits. Again, there is no showing that the ULJ erred.

Jones also argues that the evidentiary hearing was unfair for a number of reasons, including that he was "lost and confused," that the ULJ had already made up his mind about the issues during the hearing and spoke at the same time he was testifying, and that he did not know he could question the witnesses. As the ULJ ruled on reconsideration, "Jones was given ample opportunity to give any testimony relevant to his separation or ask any questions regarding the hearing or the employer's witnesses," and he did not assert that he was confused or lost at any time. Our review of the transcripts shows that this finding is supported by substantial evidence in the record and that Jones received a fair hearing.

Finally, additional issues raised by Jones do not show that the ULJ erred or that his substantial rights were prejudiced.

**Affirmed.**